Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-1264

THOMAS EARL HENDERSON JR. et al,
Petitioner,

v.

FORT WORTH INDEPENDENT SCHOOL DISTRICT
et al, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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February 8, 1979

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, Thomas Earl Henderson et al, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on November 17, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals en banc reported at 548 F.2d 115 (5th Cir.

1978), and referred to herein as Henderson III, appears as Appendix A.

The District Court opinion on the issue of attorney's fees has not been reported and appears here as Appendix B.

The panel decision of the Court of Appeals on attorney's fees referred to herein as Henderson II is reported at 574 F.2d 1210 (5th Cir. 1978).

The panel decision of the Court of Appeals on the merits referred to herein as Henderson I is reported at 526 F.2d 286 (5th Cir. 1976).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit on the issue of attorney's fees was entered on June 12, 1978. A timely petition for rehearing en banc was granted on August 14, 1978 and the judgment of the Court of Appeals en banc was entered on November 17, 1978. This petition for certiorari was filed within

ninety (90) days of that date. This Court's jurisdiction is invoked under 29 U.S.C.§ 1254(1).

QUESTIONS PRESENTED

Whether the District Court holding denying an attorney's fee award under the Civil Rights Attorney's Fee Awards Act of 1976 (42 U.S.C.§1988) to the prevailing Plaintiffs who successfully challenged a state statutory requirement that School Board officeholders be freeholders in the district for one year and qualified voter in the district for three years on the grounds that;

a) "honest pursuit and defense of their statutory duty" would render such an award "not only inappropriate but unjust"; (Appendix B p. 29)

b) the "judgment rendered for Plaintiff is not of sufficient social significance to justify and award of attorney's fees" under the Act; (Appendix B p. 27)

c) the "Defendants were guilty of no bad faith or undue obstinacy in the defense of this matter"; (Appendix B p. 29) and

d) since the issue of an award of an attorney's fee was decided after the Court of Appeals had reversed the District Court the suit was only "technically pending" on the date the Act became effective (Appendix B p. 24) is erroneous and an abuse of discretion since

1) the reasons given are not sufficient to overcome the presumption set out in Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1963) that "the successful Plaintiff should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust";

2) the District Court's discretion in awarding an attorney's fee to a prevailing Plaintiff under 42 U.S.C.§1988 is limited to a determination of the amount of the fee;

3) there are no "special circumstances" sufficient to deny the award of an attorney's fee under 42 U.S.C.§1988 where the Plaintiff prevails in vindicating constitutional rights.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42:§1988

In any action or proceeding to enforce a provision of Sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes (42 U.S.C.§1981-1983, 1985, 1986) Title IX of Public Law 92-318, (20 U.S.C.§1681 et. seq.) or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or Title VI of the Civil Rights Act of 1964, (42 U.S.C.§2000d et. seq.), the Court, in its discretion, may allow the prevailing party, other than the United States, reasonable attorney's fees as part of the costs.

STATEMENT OF THE CASE

This action was originally brought when the Appellants, Thomas Earl Henderson Jr. together with Carlos Puente (now a member of the Board of Education of the Fort Worth Independent School District) sought election to the School Board of the Fort Worth Independent School District in April of 1974. Both were denied positions on the ballot for that election by a vote of the School Board of the Fort Worth Independent School District on grounds that neither met the requirement set out by law for holding said office. This action followed for injunctive and declaratory relief seeking to have declared as unconstitutional the statutory requirement that a candidate for the School Board of the Fort Worth Independent School District be a qualified voter in that district for a period of three years and a freeholder within the district for a period of one year. The

petitioner sought relief on the theory that the candidacy requirement violated the Equal Protection Clause of the Fourteenth Amendment and unduly burdened the right of interstate travel. The District Court struck down the freeholder requirement but upheld the qualified voter restriction. Petitioners appealed. On January 22, 1976 the Court of Appeals in an opinion by Judge Thornberry, held that the three year "qualified voter" requirement went beyond the necessary power of the state to prescribe minimal candidate qualifications and denied petitioner Henderson rights secured by the Equal Protection Clause of the Fourteenth Amendment. (Henderson I, 526 F.2d 286, 293) The cause was reversed and remanded to the District Court. Petitioner Henderson ran for office in the School Board Election of 1976 but was not elected. Petitioner Puente did succeed in his election in 1978. On June 30, 1977 a hearing was conducted on

Petitioner's motion for an attorney's fee said issue having been severed out of the initial cause of action by the Pretrial Order to be heard at a later time should the Plaintiffs prevail in their constitutional claims. Following an evidentiary hearing the District Court denied Petitioner-Plaintiffs an attorney's fee stating as reasons that:

a) "honest pursuit and defense of their statutory duty" would render such an award "not only inappropriate but unjust"; (Appendix B p. 29)

b) the "judgment rendered for Plaintiff is not of sufficient social significance to justify and award of attorney's fees" under the Act; (Appendix B p. 27)

c) the "Defendants were guilty of no bad faith or undue obstinacy in the defense of this matter"; (Appendix B p. 29) and

d) since the issue of an award of an attorney's fee was decided after the Court

of Appeals had reversed the District Court the suit was only "technically pending" on the date the Act became effective. Appendix B p. 24)

The Court of Appeals affirmed the District Court judgment on June 12, 1978 holding that the Civil Rights Attorney's Fees Awards Act was primarily designed to remedy discrimination based on race, sex, religion, wealth, or other such class categories which did not apply in the opinion of the panel to the case at bar. Henderson II, 574 F.2d 1210 (5th Cir. 1978). The Court of Appeals granted the Petitioner's motion for rehearing en banc, vacated the panel opinion, reached an even division on the issues and thus affirmed the District Court opinion by operation of law. (Henderson III, Appendix A) The effect of the even division of the en banc Court was to render the panel decision of the Court of Appeals of no precedential value. (Hender-

son III, Appendix A)

REASONS FOR GRANTING THE WRIT

1. The question of what special circumstances would be sufficient to overcome the presumption of entitlement to a reasonable attorney's fee to a prevailing Plaintiff in the ordinary case has not heretofor been settled by the Court.

This Court in Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) held that in interpreting language of Title II of the Civil Rights Act of 1964 [42 U.S.C. §2000a-3(a)] identical to that used in the Civil Rights Attorney's Fees Awards Act of 1976 (42 U.S.C.§1988) that the Plaintiff "should ordinarily receive an attorney's fee unless special circumstances would render such an award unjust." 390 U.S. at 402. This Court's Per Curiam opinion was based on the Congressional intent in passing the 1964 Civil Rights Act

> not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II. 390 U.S. at 402.

This Court did not expand on the definitions of special circumstances except to note in Footnote 5 of the Court's opinion that the matter before the Court was not even a borderline case due to the frivolous defenses interposed by the Respondents.

There seems to be little doubt that Congress intended that the Newman standard be applied to the Civil Rights Attorney's Fees Awards Act of 1976. Both House and Senate reports on the act evidence Congressional intent to apply the Newman standard:

> it is intended that the standards for awarding fees be generally the same as under the Fee Provisions of the 1964 Civil Rights Act. A party seeking to enforce the rights protected by the statutes covered by S2278, if successful, "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968) Senate Report No. 94-1011 p. 5.

This Court has shown a willingness to adopt the Senate and House Reports as evidencing the legislative history of the Act. In the only decision to date to come before this Court concerning the Act, Hutto v. Finney, 46 U.S.L.W. 4817 (June 23, 1978) this Court quoting from the Senate and House Reports found that attorney's fees could be collected either directly from the official in his official capacity or from funds of the agency under his control or from the state or local government as stated in the legislative report. Hutto, supra. In Hutto this Court laid to rest the question which troubled the District Court as to the applicability of the 1976 Amendment to 42 U.S.C.§1988 to cases such as this one where the merits had already been decided when the Act was passed. (The District Court found that the case was "technically... applicable.") In Footnote 25, the Court states:

> The Attorney General also contends that the fee award should not apply to cases, such as this one, that were pending when the Act was passed in 1976. But the legislative history of the Act as well as this Court's general practice, defeat this argument. The House Report declared: "In accordance with applicable decisions of the Supreme Court, the Bill is intended to apply to all cases pending on the date of enactment..." H.R. Rep. No. 94-1558, p. 4 n. 6 (1976). See also Bradley v. School Board, 416 U.S. 696. Hutto v. Finney, supra.

The House Report on the Act cites in addition to the above quoted phrase from Newman an additional purpose in passing the Act:

> The rationale of the rule rests upon the recognition that nearly all Plaintiffs in these suits are disadvantaged persons who are victims of unlawful or unconstitutional conduct. It would be unfair to impose upon them the additional burden of counsel fees when they seek to invoke the jurisdiction of the Federal Courts. "If successful Plaintiffs were routinely forced to bear their own attorney's fees, few agrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the Federal Courts." Newman v. Piggie Park Enterprises, Inc., supra at 402. House Report 94-1558, p. 6.

The Civil Rights Attorney's Fees

Awards Act of 1976 was passed by Congress in response to this Court's decision in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975). See Senate Report No. 94-1011, p. 1, House Report No. 94-1558, pgs. 1 and 2. In Alyeska this Court speaking through Justice White underlined the importance of a statutory scheme such as the one Congress ultimately passed:

> And, if any statutory policy is deemed so important that its enforcement must be encouraged by awards of attorneys' fees, how could a Court deny attorneys' fees to private litigants in actions under 42 U.S.C.§1983 seeking to vindicate constitutional rights? Moreover, should Courts, if they were to embark on the course urged by the Respondents opt for awards to the prevailing party, whether Plaintiff or Defendant, or only to the prevailing party in question? Should awards be discretionary or mandatory? Would there be a presumption operating for or against them in the ordinary case? See Newman, supra. Alyeska Pipeline Service Co. v. Wilderness Society. 421 U.S. at 264.

The Court's speculation on the presumption of a fee award operating for or against a prevailing Plaintiff or Defendant

in the ordinary case was resoundingly answered by the Congressional enactment in the exact words of the statute interpreted by the Court in Newman.

Does the District Court's rationale for denial overcome the Newman presumption?

Henderson is at least the ordinary case, if indeed any litigation concerning constitutional rights can be considered "ordinary". It may be more.

The Petitioner succeeded in striking down a freeholder requirement that had been a part of the requirement for election to the Board of Trustees of the Fort Worth Independent School District for over four years after this Court had ruled in Turner v. Fouch, 396 U.S. 346 (1970) that such requirements were unconstitutional. In addition the Plaintiff prevailed before the Court of Appeals on the question of the durational voter registration requirement imposed upon candidates seeking election

to the Fort Worth School Board. The Fifth Circuit Panel speaking through Judge Thornberry struck down the three year voter registration requirement in the district as being in violation of the Equal Protection Clause of the Fourteenth Amendment. In doing so the Court dealt with the sticky question of which standard of review should govern the review of such a requirement and found that the requirement was subject to the strict scrutiny required where fundamental rights are at stake under the Equal Protection Clause. Henderson v. Fort Worth Independent School District, 526 F.2d 286, 292 (5th Cir. 1976). The Court of Appeals speaking through Judge Thornberry found that the District Court had applied the wrong standard of review and in reviewing the matter under the strict scrutiny standard required by the case found the statute to be unconstitutional. 526 F.2d at 293. Thus, the Plaintiff

succeeded in vindicating rights not only for himself but for others. In the School Board Election of 1976 which followed by two months the Fifth Circuit opinion 25% of the candidates for the Fort Worth Independent School Board (4 out of 17 candidates) could not have sought election had the three year voting registration requirement not been found unconstitutional.

The Court of Appeals considered the case of such significance that oral argument was scheduled in Atlanta, Georgia, some distance from the home of the Plaintiff. A well reasoned and scholarly opinion on constitutional issues of far reaching effect was rendered.

Do any circumstances arise to overcome the Newman presumption? The District Court finding that the case lacked "social significance" was apparently not shared by the Court of Appeals. Nor did the District Court state any facts to support its

conclusion. There is nothing to overcome the Newman presumption and much to support it.

The District Court rationale that Defendants lacked "bad faith" and "undue obstinacy" although mentioned frequently in the District Court's opinion were rejected over by the District Court and are unquestionably rejected in the legislative history and by Alyeska. The sole remaining reason for overriding the Newman presumption is the District Court's contention that "honest pursuit and defense of this statutory duty" would render such an award "not only inappropriate but unjust." (Appendix B p.29). To allow this rationale the status of a special circumstance such as to overcome the Newman presumption would destroy the Act. The Act was passed to provide for awards where Defendants pursue their duties in good faith. Alyeska never overruled awards where the defense was made

in bad faith. The rationale destroys the importance placed on private enforcement of the civil rights and constitutional rights by this Court in Newman and Alyeska. To allow such circumstance to defeat an award would mean every unconstitutional piece of state legislation no matter how oppressive it may be to the Constitution would defeat the shift of the economic burden of enforcement of Constitutional rights from the oppressor to the oppressed.

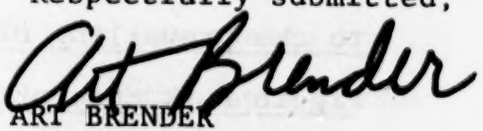
2. This Court should in the exercise of its supervisory power over the lower Federal Courts decide this issue which evenly divided the Court of Appeals on the question of whether or not any special circumstances were present such as to overcome the presumption of an attorney's fee to the prevailing Plaintiff in Newman v. Piggie Park Enterprises, Inc., 290 U.S. 400 (1968). Since the Fifth Circuit Court of Appeals evenly divided on the issue

this Court should, in an area that has become an increasing problem and a source of increasing litigation and appeals, decide the question of under what circumstances if any the District Court may deny an attorney's fee. This Court should provide lower Federal Courts guidance as to the presumption of a fee in the ordinary case and under what if any set of circumstances the District Court can deny a fee even though the Plaintiff prevails particularly where Constitutional as opposed to statutory rights are at stake.

RELIEF SOUGHT

For these reasons, a writ of certiorari should issue to review the judgment of the Fifth Circuit.

Respectfully submitted,



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February 8, 1979

Appendix A

Thomas Earl HENDERSON, Jr., et al.,
Plaintiffs-Appellants,

v.

FORT WORTH INDEPENDENT SCHOOL DISTRICT
et al., Defendants-Appellants.

No. 77-2839.

United States Court of Appeals,
Fifth Circuit.

Nov. 17, 1978

Appeal from the United States District Court for the Northern District of Texas; Eldon B. Mahon, Judge.

Before BROWN, Chief Judge, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN and VANCE, Circuit Judges.

PER CURIAN:

In this case, a panel of the Court affirmed the district court by a written opinion. Henderson v. Fort Worth Independent School District, 574 F.2d 1210 (5th Cir. 1978). A petition for rehearing

en banc was granted, which effectively vacates the panel opinion as a citable precedent. With the panel opinion vacated the en banc court has reached an even division as to the issues raised on appeal. Thus, the district court is affirmed by operation of law, and the decision of the court of appeals has no precedential value.

AFFIRMED BY OPERATION OF LAW.

Appendix B

EARL HENDERSON

VS.

FORT WORTH INDEPENDENT SCHOOL DISTRICT

CIVIL ACTION NO. CA 4-74-58

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ORDER

There is now pending before the Court Plaintiff's Motion for Attorney's Fees. This motion came on for hearing before the Court on 30 June 1977. After careful consideration, the Court in its discretion in this matter is of the opinion that the motion should be denied.

Plaintiff in this motion relies solely on Public Law 94-559, The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. A. §§ 1988. The pertinent passage is the following:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this

> title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. (emphasis supplied).

Plaintiff's Trial Brief in support of the motion for an award of reasonable attorney's fee contends that the Civil Rights Attorney's Fees Awards Act of 1976 applied retroactively to lawsuits pending in federal courts on the date of enactment October 19, 1976, and Plaintiff cites legislative history and cases in support thereof.

This Court agrees that technically 42 U.S.C. 1988 is applicable.

This suit was technically pending on the date of the attorney's fees amendment to 42 U.S.C. 1988. This Court entered a memorandum opinion on March 5, 1974, denying temporary relief. In a Pre-Trial Order

filed January 30, 1975, the question of attorney's fees was severed out from the cause. On May 13, 1975, this Court entered a take nothing judgment against the Plaintiff.

On January 22, 1976, the United States Court of Appeals for the Fifth Circuit, at 526 F.2d 286 (5th Cir. 1976), reversed and remanded the prior judgment of this Court, and instructed this Court to enter a new judgment.

Approximately nine months later, on October 19, 1976, the attorney's fees amendment to 42 U.S.C. 1988 was enacted.

Due to the heavy case load and docket schedule, the formality of entering an Order withdrawing the Judgment of May 13, 1975, and entering a new Judgment, holding Section 7 of Chapter 230, Local and Special Laws, Acts of the 39th Legislature of the State of Texas, 1925, to be unconstitutional was not officially entered until February

14, 1977, though the merits had in actuality been resolved by the appellate judgment of January 22, 1976, and the decision of Defendants not to pursue an appeal.

In a technical sense as to the procedural entry of judgment by this Court, the suit was pending on October 19, 1976. In addition it should be noted that the question of attorney's fees had been severed in the Pre-Trial Order and was also pending. It is appropriate to apply the attorney's fees provision of 42 U.S.C. 1988 to this action.

It should be noted that this suit was never certified as a class action.

Under the provision of 42 U.S.C. 1988, the award of attorney's fees is by no means mandatory, but by the precise wording of the provision discretionary with the Court. In the discretionary judgment of this Court it would be inappropriate to award attorney's fees under the facts presented

in this case, especially in view of the fact that the final judgment should have been entered earlier by this Court, prior to the enactment of the attorney's fees amendment to 42 U.S.C. 1988. In addition, under the unique fact situation in this case, it is the discretionary opinion of this Court that the judgment rendered for Plaintiff is not of sufficient social significance to justify an award of attorney's fees under 42 U.S.C. 1988.

Plaintiff in his Trial Brief and by oral admission of his attorney at the hearing on this question admitted that Defendants were guilty of no bad faith or undue obstinacy in the defense of this matter. Had any element or aspect of bad faith been present, this Court would not hesitate in awarding appropriate attorney's fees to Plaintiff. Since this Court initially found for the Defendant obviously there was no bad faith present. This

Court comments on the lack of bad faith simply for purposes of clarity and perspective, and in full awareness that there is no bad faith standard necessary under 42 U.S.C. 1988, and that under the statute an award of attorney's fees may be made even when there is a complete absence of bad faith.

Plaintiff had sought to have an Act of the Legislature of the State of Texas, enacted in 1925 and never before challenged, declared unconstitutional. The School Board of the Fort Worth Independent School District was under a duty to comply with the legislative enactment until the Act was changed or until instructed by a court to do otherwise.

The January 22, 1976 opinion of the Court of Appeals instructed the Fort Worth Independent School District that compliance with the Act was unlawful. Consequently, the School District ceased to comply with

the Act, pursued no appeal, and placed Plaintiff's name on the ballot as a candidate in the School Board election in April 1976, approximately six months prior to the attorney's fees amendment to 42 U.S.C. 1988, and ten months prior to the official entry of a new judgment by this Court.

The School District demonstrated no bad faith, or undue obstinacy, but simply diligently pursued their duty as dictated by statute. Had it not been for the delay of this Court in disposing of the final judgment, this matter would have been long since disposed of before the statutory amendment authorizing attorney's fees was passed. Under the facts of this case, to hold the Fort Worth Independent School District accountable for attorney's fees resulting from the honest pursuit and defense of their statutory duty would in this Court's discretion be not only inappropriate but unjust.

In summary, it is the discretionary opinion of this Court that an award of attorney's fees in this matter under 42 U.S.C. 1988 should not be based on or justified by any claim of social significance as presented by the limited and unique facts of this case. Nor is there any element of bad faith present upon which to base an award. The only basis under which an award of attorney's fees is even possible is the result of the unfortunate length of time taken by this Court in technically entering a final judgment. To penalize the Defendant School District for the extended time taken by this Court on acting on a procedural formality would not in the discretion of this Court be just, equitable, or in good conscience.

Accordingly, the Court ORDERS that Plaintiff's Motion for Attorney's Fees be denied.

Entered this 14 day of July, 1977.

UNITED STATES
DISTRICT JUDGE